

LAWRENCE J. TEKER
TEKER TORRES & TEKER, P.C.
Suite 2-A, 130 Aspinall Avenue
Hagatna 96910-5018, Guam
Telephone: (671) 477-9891
Facsimile: (671) 472-2601

John E.D. Powell, WSBA #12941
CAIRNCROSS & HEMPELMANN, PS
524 Second Avenue, Suite 500
Seattle WA 98104
Telephone: (206) 587-0700
Facsimile: (206) 587-2308

Attorneys for Defendants *Marwan Shipping
& Trading, Five Seas Shipping Co., LLC,
and Al-Buhaira National Insurance Co.*

FILED

DISTRICT COURT OF GUAM

APR - 6 2007 *hbe*

MARY L.M. MORAN
CLERK OF COURT

UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARWAN SHIPPING & TRADING CO.,
FIVE SEAS SHIPPING CO., LLC AND S.J.
GARGRAVE SYNDICATE 2724, IN
PERSONAM, NAVIGATORS PROTECTION
& INDEMNITY, AND AL-BUHAIRA
NATIONAL INSURANCE COMPANY,

Defendants

AND CROSS-CLAIMS, COUNTERCLAIMS,
THIRD-PARTY COMPLAINT, AND CLAIM
IN INTERVENTION.

NO. CIV06-00011

SUPPLEMENTAL DECLARATION OF
JOHN E.D. POWELL IN OPPOSITION TO
GARGRAVE SYNDICATE 2724'S MOTION
TO DISMISS CROSS-CLAIM OR
ALTERNATIVELY TO STAY THE CROSS-
CLAIM

Complaint Date: April 19, 2006

Trial Date: Not set

I, John E.D. Powell, declare as follows:

1. I am counsel for Defendants and Cross-claimants Marwan Shipping & Trading Company and Five Seas Shipping Company, LLC (collectively, "Marwan") and Al-Buhaira National Insurance Company in the above-captioned matter. I am admitted *pro hac vice* to

DECLARATION OF JOHN E.D. POWELL
CAUSE NO. CIV06-00011 - 1

Cairncross & Hempelmann, P.S.

Law Offices

524 Second Avenue, Suite 500

Seattle, Washington 98104-2323

Phone: 206-587-0700 • Fax: 206-587-2308

ORIGINAL

1 practice before this Court. I am over the age of 18 years and have personal knowledge of the
2 facts set forth in this declaration.

3 2. I am submitting this declaration in an effort to correct several glaring mis-statements
4 of law and fact that have been asserted by Gargrave in its Reply Memorandum in Support of its
5 Motion to Dismiss. These misrepresentations and omissions present a false and misleading
6 picture to this Court and, as a result, threaten the integrity of this Court's decision on the pending
7 Motion to Dismiss.

8 3. I took the deposition of Stephen Gargrave in London, England on Wednesday,
9 March 7 and Thursday, March 8, 2007. Mr. Gargrave was the lead underwriter of Gargrave
10 Syndicate 2724 in August 2004 at the time Marwan obtained the OPA Insurance Policy and
11 COFR guaranty at issue in this case. Gargrave Deposition, p. 14:16-15:20. Because this
12 deposition was conducted after the filing deadline for Marwan's Response to Gargrave's Motion,
13 I could not reference or append excerpts from the transcript of that deposition to my initial
14 declaration. I have since obtained the transcript of Mr. Gargrave's examination. Attached hereto
15 as Exhibit A is a true and correct copy of several relevant excerpts. It is urgent that these
16 excerpts be considered by the Court because they contradict and undermine key representations
17 made by Gargrave in its Motion to Dismiss and supporting Reply.

18 4. The transcript of Mr. Gargrave clearly establishes that despite the movant's assertions
19 in its' Motion to Dismiss, the OPA Insurance Policy was not "a freely negotiated private
20 international agreement." Given the urgency with which this insurance was required by the
21 AJMAN 2, the OPA Insurance Coverage was procured over a period of just a few days. The
22 OPA Insurance Policy (one of Lloyd's standard forms (LSW 1220)), and the Cover Note were
23 never sent to, much less reviewed by, either the underwriter or the assured. According to
24 testimony of the Ropner Brokers, the only terms of the insurance that were discussed by anyone,
25 were discussed Ropner (the agent of the Underwriters) and Navigators (the P&I insurer for the
26 AJMAN 2 who was not the agent of anyone. The terms discussed by these two parties)

DECLARATION OF JOHN E.D. POWELL.
CAUSE NO. CIV06-00011 - 2

Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

1 regarding the OPA Insurance Coverage were the policy limits, the type of insurance needed, and
2 the length of the insurance term.

3 At no time did any party negotiate, much less discuss, the provisions that are at issue in
4 Gargrave's Motion to Dismiss:

- 5 • Mr. Gargrave testified that Ropner did not write the terms of the OPA Insurance
6 Policy issued to Mawan. Rather, it was "a standard Market form." Gargrave
7 Deposition, p.116:21-23.
- 8 • Mr. Gargrave testified that in general, the assured and the insurer never
9 communicate directly when an assured seeks to procure insurance. He further
10 confirmed that the same held true in the present case and that neither Marwan nor
11 its agent, Geoffrey Woodcock, had any contact with Gargrave or Ropner at the
12 time the insurance was obtained. Gargrave Deposition, p. 109:12-112:21.
- 13 • Mr. Gargrave explicitly agreed that **"....at no point in time, when the contract
14 of insurance was being negotiated and in fact for what we have established
15 three or four weeks thereafter, was a wording produced where someone
16 could say Marwan or its agents had agreed to the jurisdiction clause[.]"**
17 Gargrave Deposition, p. 125:16-24 (emphasis added).
- 18 • Mr. Gargrave testified that Ropner, not Gargrave, always prepares the Cover Note
19 that accompanies an insurance policy. Generally, Gargrave never sees these
20 Cover Notes. Gargrave Deposition, p.112: 25-113:6; see also p. 59:10-11 ("To be
21 honest, we don't normally get to see Cover Notes, so we wouldn't know [what
22 they contain].)."

23 5. Marwan's agent, Geoffrey Woodcock, testified that he did not negotiate of the OPA
24 Insurance Policy or Cover Note terms. The parties deposed Mr. Woodcock on March 2, 2007 in
25 London, England. The transcript for this deposition arrived in my office on March 27, 2006 and
26 could not be submitted to the Court prior to that time. Attached hereto as Exhibit B is a true and

DECLARATION OF JOHN E.D. POWELL
CAUSE NO. CIV06-00011 - 3

Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

1 correct copy of several relevant excerpts. Mr. Woodcock is employed by Crestmar Marine
2 Services, an insurance services company that consults with shipowners and charterers. Crestmar
3 has worked with Marwan for several years to arrange insurance coverage for its various vessels.
4 When the M/V AJMAN 2 urgently needed to enter U.S. waters in August 2004, Mr. Woodcock
5 approached Navigators Protection & Indemnity, the vessel's P&I insurer, about obtaining a
6 COFR and OPA insurance coverage. Mr. Woodcock testified that although Navigators was
7 unable to provide the OPA insurance coverage itself, it offered to work with a broker (Ropner) to
8 arrange cover with another underwriter (Gargrave). Woodcock Deposition, p. 41:23-42:10. Mr.
9 Woodcock had no further involvement with obtaining the OPA Pollution Insurance Policy, aside
10 from forwarding the premium. Woodcock Deposition, p. 42:19-24; 60:14-62:10. "Navigators
11 quite kindly just dealt with it." Woodcock Deposition, p. 62:4-5.

12 6. Consistent with the testimony of Mr. Gargrave and Mr. Woodcock, Paul Harcombe, a
13 broker with Ropner, also confirmed that the terms of the OPA Pollution Insurance were not
14 negotiated by the parties. Mr. Harcombe was deposed by the parties on March 6, 2007 in
15 London, England. The transcript for this deposition arrived in my office on March 28, 2006 and
16 could not be submitted to the Court prior to that time. Attached hereto as Exhibit C is a true and
17 correct copy of several relevant excerpts. Mr. Harcombe was responsible for brokering the
18 COFR cover at Navigators' request, as well as confirming that Gargrave would issue the
19 underlying, prerequisite OPA Insurance Policy. Harcombe Deposition, p. 7:25-8:11; 10:2-8;
20 18:21-19:6. When Navigators issued a request for coverage to Ropner on August 18, 2004, the
21 broker forwarded it to Gargrave the day it was received. Harcombe Deposition, p.20:11-21:24.
22 He testified that Mr. Gargrave confirmed that Gargrave would issue the OPA Insurance coverage
23 and the COFR guaranty the same day, and there is no evidence that anyone at Ropner negotiated
24 the policy terms between Gargrave and Navigators during that process. Harcombe Deposition, p.
25 22:4-23:5. At no time during his involvement with the the COFR and OPA coverage
26

DECLARATION OF JOHN E.D. POWELL
CAUSE NO. CIV06-00011 - 4

Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

1 procurement process did Mr. Harcombe have any contact with Marwan. Harcombe Deposition,
2 p. 36:7-37:1

3 7. In its Motion to Dismiss, Gargrave makes another misleading omission in its
4 discussion of the Cover Note: it neglects to disclose that the Cover Note did not exist at the time
5 Gargrave issued the OPA Insurance Policy and bound coverage pursuant to the terms of Form
6 LSW 1220. The Cover Note is dated **approximately four weeks later**, September 24, 2004.
7 This date is long after the AJMAN 2 ran aground in Apra Harbor, Guam. Gargrave Deposition,
8 p. 58:23-59:4.

9 8. Rowland Dawe, Ropner's head of marine brokering, further confirmed that the Cover
10 Note was not prepared concurrently with Gargrave's consent to provide OPA coverage to
11 Marwan. Mr. Dawe was deposed by the parties on March 6, 2007 in London, England. The
12 transcript for this deposition arrived in my office on March 28, 2006 and could not be submitted
13 to the Court prior to that time. Attached hereto as Exhibit D is a true and correct copy of several
14 relevant excerpts. Mr. Dawe testified that although he generally controlled Ropner's OPA
15 insurance policy placement, he was out of the office at the time Navigators first contacted
16 Ropner about the M/V AJMAN 2. Consequently, Mr. Harcombe arranged for Gargrave to issue
17 the COFR guaranty and related OPA coverage. Dawe Deposition, p. 16:8-17:21; 96:21-97:8.
18 Mr. Dawe subsequently put together the placement documentation upon his return to the office.
19 Dawe Deposition, p. 15:3-16. Mr. Dawe did not correspond with Navigators in connection with
20 that process. Dawe Deposition, p. 17:22-18:6. He likewise had no communication with Marwan
21 regarding the documentation. Dawe Deposition, p. 78:22-79:22. Not only was Mr. Dawe out of
22 the office at the time Gargrave issued the OPA Insurance Policy to Marwan, he did not return
23 until after the M/V AJMAN 2 had run aground in Apra Harbor, Guam. Dawe Deposition, p.
24 43:21-25. The Cover Note prepared by Ropner to memorialize the issuance of the OPA
25 Insurance Policy was not prepared until after the Underwriters had already given Marwan 30
26 days' notice that the policy would be cancelled. Dawe Deposition, p. 47:8-23.

DECLARATION OF JOHN E.D. POWELL
CAUSE NO. CIV06-00011 - 5

Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

1 9. Because the terms of the OPA Insurance were part of a standard Lloyd's Form policy,
2 and because the later-issued Cover Note was never negotiated by the parties, Gargrave's
3 continued reliance on the Cover Note's reference to arbitration as a "negotiated" term is entirely
4 without merit. Mr. Gargrave, who has served as a Lloyd's underwriter for 27 years, testified that
5 in his experience, when a Lloyd's Form contract intends to require arbitration, it always includes
6 an explicit arbitration clause and does not reference the English courts. He admitted that prior to
7 viewing the at-issue Cover Note at his deposition, he had never in his career seen a provision
8 worded like the English Law and Jurisdiction clause ("ELJ") in this case. Gargrave Deposition,
9 p. 122:18-123:6. Despite Mr. Booth's valiant attempts, through the impermissible use of
10 speaking objections, to coach the witness about how to answer questions of fact regarding his
11 experience as a longtime Lloyd's underwriter, Mr. Gargrave testified that the arbitration
12 language contained in the at issue Cover Note was a mistake:

13 Q:...So you agree that this says "exclusive jurisdiction in English courts"
14 meaning "the courts;" correct?

15 A. Yes, yes.

16

17 **Q: It then says: "The seat of arbitration shall be London." Do you see that?**

18 **A: I do.**

19 **Q: Do you admit and acknowledge that that's a mistake?**

20 **A: Yes.**

21 Gargrave Deposition, p. 120:24-121:16.

22 10. All of Mr. Booth's protestations notwithstanding, Mr. Gargrave still could not (and
23 indeed would not) deny that 1) the standard Lloyd's Form OPA Insurance Policy has never
24 contained an arbitration clause and 2) the ELJ Clause in the Cover Note did not resemble the
25 standard arbitration clauses employed by Lloyd's of London in its insurance contracts. Gargrave
26 Deposition, p. 124:10-24.

DECLARATION OF JOHN E.D. POWELL
CAUSE NO. CIV06-00011 - 6

Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

1 11. In addition to the deposition transcripts discussed above, it is imperative that this
2 Court review Exhibit E to this declaration, an opinion by the venerable and respected London
3 office of Reed Smith Richards Butler LLP. This exhibit squarely addresses the pervasive errors
4 in Gargrave's analysis under English law. Drafted by English solicitors who routinely practice
5 before the London courts, this opinion completely undermines Gargrave's conclusions regarding
6 the enforceability of the ELJ Clause and the impact of Gargrave's own cross-claims against
7 Marwan.

8 12. Just as it has misconstrued English law in order to reach the conclusion it seeks,
9 Gargrave's Reply brief engages in a tortured and erroneous analysis of the Service of Suit Clause
10 in an effort to justify its assertion that the Policy permits Gargrave to "transfer" the instant case
11 to England. Gargrave builds its argument on an out-of-context fragment from paragraph 14 of
12 the OPA Insurance policy. The full paragraph reads as follows:

13 Notwithstanding any other provision elsewhere in this Insurance Policy relating to
14 jurisdiction, it is agreed that the Underwriters have the right to commence an
15 action in any court of competent jurisdiction in the United States of America, and
16 nothing in this clause constitutes or should be understood to constitute a waiver of
17 Underwriter's rights to seek removal remand or transfer of any suit to any other
18 court of competent jurisdiction as permitted by the laws of the United States of
19 America or any state therein.

20 Gargrave places its emphasis on the wrong portion of this clause. . . the portion that
21 affirms the right of the Underwriter to seek removal, remand, or transfer of a case. The
22 significant qualifier to this right, however, is that a case may only be transferred "as permitted by
23 the laws of the United States of America or any state therein." This clarifies that the word
24 "remove" is a specific reference to removal jurisdiction under 28 U.S.C. § 1441, which permits a
25 party to move an existing case from state court to federal court. It also means that the word
26 "remand" is a specific reference to 28 U.S.C. § 1447, which permits one party to move an
existing case from federal court to state court. Finally, the clause clarifies that a party can seek
to transfer venue from one court within a state to another or from federal court to federal court
using the relevant venue transfer provisions in the initiating court's civil procedure rules. A

DECLARATION OF JOHN E.D. POWELL
CAUSE NO. CIV06-00011 - 7

Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

1 transfer, like a remand or removal action, is a mechanism that obligates the receiving court to
2 continue an existing action, picking up the proceedings where the originating court left off. It
3 can only be effectuated if the transferring court has the authority to instruct the transferee court
4 to continue the litigation. These rules do not grant federal or state courts the authority to transfer
5 an existing action from the United States to a foreign jurisdiction; there is simply no procedural
6 mechanism for it. Courts of the United States lack the authority to instruct foreign courts to
7 accept and preside over an existing action. Thus, paragraph 14 of the OPA Insurance Policy
8 cannot be construed as Gargrave asserts.

9 13. Marwan would also like to take this opportunity to address Gargrave's deliberate
10 attempt in its Reply to misinform the Court about the ripeness of Marwan's Cross-Claim. While
11 it is true that the OPA Insurance Policy is an indemnity policy and that arguably nothing is owed
12 by the underwriters until money is spent by the assured, the insurance agreement requires the
13 underwriters to indemnify the assured for its defense and investigation costs. Marwan tendered
14 these already incurred defense costs, as well as the attending obligations, to the underwriters and,
15 in response, the underwriters attempted to rescind the policy. The indemnity obligation is
16 mature. It has been triggered and refused, making the issue ripe for resolution by this Court.
17 Additionally, the Marwan Cross-Claims are ripe because any judgment on the Gargrave Cross-
18 Claims will likely constitute res judicata and collateral estoppel for many elements of the
19 Marwan Cross-Claims.

20 14. I also want to bring to the Court's attention Gargrave's attempt, in footnote Footnote
21 5 of the Reply, to manufacture some significance from the fact that Marwan referenced the
22 Cover Note rather than the Policy in its Cross-Claim. Gargrave's recitation of this circumstance
23 is flagrantly misleading: Marwan was unable to make a specific reference to the OPA Insurance
24 Policy language at the time it filed the Marwan Cross-Claim because Gargrave had yet to
25 provide Marwan with a complete copy of the policy. Consequently, I did not have a copy of the
26 policy at the time the Marwan Cross-Claim was filed. Only recently was I able to obtain a copy

DECLARATION OF JOHN E.D. POWELL
CAUSE NO. CIV06-00011 - 8

Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

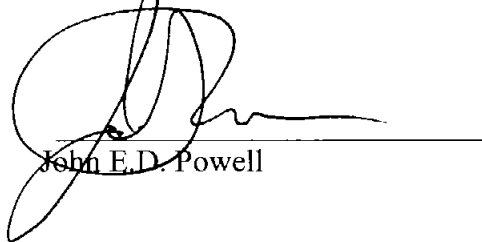
1 of Lloyd's Form LSW 1220 from a third party source. The fact that Gargrave not only withheld
2 the policy from the parties in discovery but also from the Court when it filed the instant motion
3 evidences the lack of integrity inherent in its Motion to Dismiss.

4 15. Finally, I cannot remain silent in the face of Gargrave's audacious claims about the
5 nature of its own Cross-Claims against Marwan. It is a matter of record that Gargrave seeks
6 declaratory relief from this Court that it does not have an obligation to insure Marwan. Gargrave
7 sought this declaratory relief first. It was this claim that brought the Marwan Cross-Claims
8 squarely within the jurisdiction of this Court.

9 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
10 UNITED STATES AND GUAM THAT THE FOREGOING IS TRUE AND CORRECT.

11 Dated this 29, day of March, 2007 in Seattle, Washington.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26



John E.D. Powell

DECLARATION OF JOHN E.D. POWELL
CAUSE NO. CIV06-00011 - 9

Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

COPY

UNITED STATES OF AMERICA,

Plaintiff,

INCHCAPE SHIPPING SERVICES GUAM,
LLC,

Plaintiff-in-Intervention)

vs.

MARWAN SHIPPING & TRADING CO.,
FIVE SEAS SHIPPING CO., LLC, and
S.J. GARGRAVE SYNDICATE 2724,
in personam, NAVIGATORS
PROTECTION & INDEMNITY, and
AL-BUHAIRA NATIONAL INSURANCE
COMPANY,

Defendants

AND CROSS-CLAIMS, COUNTERCLAIMS,
THIRD-PARTY COMPLAINT, and
CLAIM-IN-INTERVENTION.

Oral videotaped deposition of
MR STEPHEN GARGRAVE held at the offices
 of ReedSmith Richards Butler,
 Beaufort House, 15 St. Botolph Street,
 London EC3A 7EE, England, United Kingdom
 at 9.21 a.m. on Wednesday March 7, 2007
 before Leah Willersdorf, Associate of
 the British Institute of Verbatim Reporters

V O L U M E 1
 (pages 1 to 137 inclusive)

ANGLO-AMERICAN COURT REPORTERS LTD
 LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Web site: www.aacr.comEmail: info@aacr.com

Case 1:06-cv-00011

Document 122

Filed 04/06/2007

Page 11 of 28



1 underwriter with respect to whatever insurances were
2 provided in this case -- and I'm not assuming that
3 there's coverage there. We will leave aside the issue
4 of coverage, defenses and things like that.

5 A. Thank you.

6 Q. Is that what Gargrave did; that is,
7 underwrite insurances in this case?

8 A. Gargrave underwrote insurances, yes.

9 Q. And the Gargrave Syndicate 2724 in this case,
10 were you personally one of the capital investors? And
11 I'm distinguishing now your role as -----

12 A. No.

13 Q. ----- as the manager of the underwriters?

14 A. No, I wasn't a capital investor. I was
15 an employee.

16 Q. You were an employee of Lloyd's or
17 specifically Lloyd's Syndicate 2724?

18 A. Of the managing agency, Limit, who operate
19 the Syndicate 2724.

20 Q. What is the name of the managing agent, to
21 use your term -----

22 A. Yes.

23 Q. ----- that acted on behalf of Gargrave 2724?

24 A. Limit Underwriting Ltd.

25 MR POWELL: Mike, was that true at all times?

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacr.com Document 122 Filed 04/06/2007 Page 12 of 28



1 MR UNDERHILL: I'm sorry.

2 MR POWELL: Was that true in 2004?

3 THE WITNESS: Yes.

4 MR POWELL: Okay, thanks.

5 BY MR UNDERHILL:

6 Q. Limit Underwriting Limited, and let's focus
7 on the -- let's focus on the period August -- from
8 August 1 of 2004 through the end of that year.

9 A. Mmm-hmm.

10 Q. And the reason I choose that time is because
11 this incident arose some time in -- initially arose in
12 August of 2004. That's why I chose that time.

13 A. Yes.

14 Q. From that period, August 1, 2004 through the
15 end of 2004, was Limit Underwriting Ltd the managing
16 agent for Gargrave Syndicate 2724?

17 A. Yes, it was.

18 Q. And what is your title, if any, within
19 Limit Underwriting Ltd, or what was it at that time?

20 A. It was Active Underwriter of Syndicate 2724.

21 Q. Is that a job title? I mean, is it actually a
22 title that you carried with you at that time?

23 A. Yes.

24 Q. And I didn't write as fast as she did. Could
25 you give me the name again, Active...?

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.a-acr.com

E-mail: info@a-acr.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 15 of 28



1 would not have taken on the Ajman 2 as a risk under the
2 pollution cover if we were under the impression that
3 there was already an incident that had occurred that
4 had -- or would give rise to a pollution, or a threat
5 of pollution under the pollution policy.

6 We would not have agreed to give cover if the
7 Ajman 2 was on a breakup voyage. We would not have
8 given pollution if we had understood that the vessel
9 was unseaworthy and would struggle to actually make
10 any, whether it was short or long, trip.

11 So therefore all those aspects have become
12 part of this case. But whether that particular
13 paragraph there that says Navigators had forwarded
14 information that was in fact erroneous, I'm not quite
15 sure where that statement came from because I wasn't
16 aware that Navigators knew that information at the time
17 that we were binding the pollution cover to our policy.

18 Q. Okay. Thank you. Let's go back to -----

19 A. Sorry, do you want that back in your pile?

20 Q. Thank you. Back to Exhibit 97 which I --
21 do you still have 97 before you?

22 A. Yes.

23 Q. How was it that Ropners was issuing this
24 Cover Note in September 24 of 2004, despite the fact
25 the first notice of claim of any loss under the policy

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacr.com

E-mail: info@aacr.com

Case 1:08-cv-00011 Document 122 Filed 04/06/2007 Page 14 of 28



1 or policies went back to somewhere in August 23,
2 August 24, around those dates?

3 A. I'm afraid I can't comment on that. I didn't
4 -- I don't know.

5 Q. Is -- strike that.

6 The fact that they did, in fact, appear to do
7 that in this case, would that be outside the bounds of
8 normal practice as respects Ropners' relationship with
9 Gargrave for pollution cover?

10 A. To be honest, we don't normally get to see
11 Cover Notes so we wouldn't know. But in my own opinion,
12 that's longer than it would normally be for a
13 Cover Note to be issued. But that's purely my
14 personal opinion.

15 Q. Okay. Could you go to Exhibit 98, please?
16 Take a moment to review it, and this is MER-00181 and
17 00182. It is a two-page document. Have you ever seen
18 this document or these documents before?

19 A. No.

20 MR POWELL: Can we take a short break?

21 MR UNDERHILL: Yes.

22 MR POWELL: Two minutes. I know you're in a
23 hurry, but I need a short break.

24 THE VIDEOGRAPHER: Going off the record
25 at 10.40 a.m.

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.a-acr.com

E-mail: info@a-acr.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 15 of 28



1 Q. Did you, at Gargrave, go directly to your
2 assured and query any of the concerns that had led to
3 the cancel of cover?

4 A. No.

5 Q. Because the P&I cancellation was the premise
6 upon which the Gargrave cancelled, not the actions of
7 the assured?

8 A. That would -- yes, yes. Actually that would
9 be absolutely correct because we only had the pollution
10 inquiry and the COFR inquiry through Navigators because
11 they were issuing the P&I, yes.

12 Q. Okay. Let me walk through the normal course
13 and make sure I have got this right. I think I know
14 this, but I want to lay a premise and lay a foundation.

15 A. Okay.

16 Q. The assured goes to the broker. The broker
17 goes to the underwriter asking for the cover. The
18 underwriter communicates, through the broker, back to
19 the assured. Okay, that is the line of communication?

20 A. Yes.

21 MR BOOTH: In a normal case.

22 BY MR POWELL:

23 Q. In a normal case; right?

24 A. Yes.

25 Q. And as a result of that communication,

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacr.com

Email: info@aa-cr.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 10 of 28



1 assuming it is a successful communication, an insurance
2 contract issues?

3 A. Yes.

4 Q. Okay. At no point in that conversation, in
5 that communication, does the assured and the
6 underwriter sit down and negotiate the terms of the
7 insurance contract?

8 A. No, never.

9 Q. Okay. Our case, it is a little bit more
10 convoluted but it is the same premise essentially,
11 I think. Marwan goes to -- tell me if I say anything
12 here and you are going, "I don't know that to be true",
13 but I think we probably know these things between us.

14 A. Okay.

15 Q. Marwan goes to Crestmar, Geoffrey Woodcock.
16 That is his -- their broker; okay?

17 A. Okay.

18 Q. Geoffrey -- goes to Geoffrey Woodcock and
19 says, "We need the Certificate of Financial
20 Responsibility" and Geoffrey goes to SIGCo.

21 A. Right.

22 Q. Do you know that?

23 A. Yes, I know SIGCo.

24 Q. Okay. SIGCo requires pollution cover for
25 issuing a COFR; correct?

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacr.com

Email: info@aacr.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 17 of 28



1 A. Yes.

2 Q. So Geoffrey goes to Navigators which is his
3 P&I, or is the P&I cover for Marwan, already
4 existing; okay?

5 A. Okay.

6 Q. For the Ajman 2. And he knows that Navigators
7 has a pollution cover but excluding U.S. waters on the
8 P&I policy.

9 A. Okay.

10 Q. Okay?

11 A. Yes.

12 Q. He asks them if they will waive the
13 provisions to allow this vessel to enter into Guam so
14 that they can have -- it can represent to SIGCo that
15 they have the pollution cover that is required for the
16 issuance of the COFR; okay?

17 A. Okay.

18 Q. Navigators refuses: (1) they don't want to
19 work with SIGCo. I haven't talked to him yet, I don't
20 know why, but -- because they want to work with EPG is
21 what it is. And Navigators says, "Look, I'll take care
22 of this" and Geoffrey Woodcock, who knows nothing about
23 COFRs, goes, "Great". Okay so far?

24 A. Yes.

25 Q. Navigators goes to Ropners and Ropners goes

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacr.com

E-mail: info@aacr.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 18 of 28



1 to -- for purposes of obtaining the pollution
2 insurance, Ropners goes to Gargrave, Gargrave confirms
3 to Ropners the pollution cover?

4 A. Yes.

5 Q. And that is communicated back to Navigators
6 and to EPG?

7 A. Yes.

8 Q. Okay. In that chain, there is not one time
9 when Marwan or its agent, Geoffrey Woodcock, have any
10 communication directly with Gargrave; correct?

11 A. Correct.

12 Q. In fact, neither of them have any
13 communication directly with Ropners; correct?

14 A. Correct.

15 Q. Okay. So at no time does the assured
16 negotiate the terms of an insurance contract with
17 Gargrave; correct?

18 A. Correct.

19 Q. Okay. Through that whole process,
20 pollution coverage is bound; right?

21 A. Yes.

22 Q. And that all happens on or about
23 August 19, 2004; correct?

24 A. Yes, correct.

25 Q. Subsequently an Insurance Cover Note issues

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacr.com

Email: info@aacr.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 19 of 28



1 from Ropners; correct?

2 A. Correct.

3 Q. Do they prepare that or do you?

4 A. They do.

5 Q. Okay. Do you see it?

6 A. No.

7 Q. Are you familiar with the terms of it?

8 A. Well, it should represent exactly what
9 we have agreed.

10 Q. Agreed with who, Ropners?

11 A. It should be what we, as the underwriters,
12 have agreed with Ropners for Ropner to issue a
13 Cover Note.

14 Q. Okay, okay. And I want you to turn to
15 Exhibit 51, if you will; do you have that?

16 A. Yes.

17 Q. I am the one who doesn't have it. There we
18 go. We confirmed yesterday and earlier today that this
19 is the insurance policy; okay?

20 A. Okay.

21 Q. If you look at the first -- the second page
22 of Exhibit 51, it is the first page of the Cover Note;
23 is that correct?

24 A. This actually isn't -- 51 isn't a Cover Note.
25 51 is the Slip Agreement between underwriters and

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.a-acr.com

E-mail: info@a-acr.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 20 of 28



1 MR BOOTH: I certainly did not show it to
2 you, no.

3 THE WITNESS: Okay. Then I haven't seen it.
4 BY MR POWELL:

5 Q. Okay. Are you aware of the fact that Gargrave
6 counter-claimed -- I mean cross-claimed against Marwan
7 and Five Seas in the Guam action?

8 A. Am I aware of that? No.

9 Q. Okay. You didn't know that?

10 A. Well, I'm not aware of it in that document.
11 Am I aware that why we are all sitting around the table
12 here that it involves you (referring to Mr Underhill)
13 as Coast Guard, Marwan and Lloyd's and we are all
14 inextricably linked in this particular issue, then yes.

15 Q. Fair enough. I mean, you haven't sat down and
16 reviewed this -----

17 A. I have not reviewed that.

18 Q. That's fair enough. Look at the first
19 paragraph of the Service of Suit clause.

20 A. Yes.

21 Q. This is a document, is it not, this policy of
22 insurance, it is written by Ropners; correct?

23 A. No, that is a standard Market form.

24 Q. The standard Market form -----

25 A. Yes.

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacrr.com

Case 1:06-cv-00044 Document 122 Filed 04/06/2007 Page 21 of 28



1 construed in accordance with... [English law]."

2 With the law; right?

3 A. Yes.

4 Q. "...and the exclusive jurisdiction of the
5 English courts..."

6 A. Yes.

7 Q. You understand that that means the exclusive
8 jurisdiction of the courts?

9 MR BOOTH: Well, hang on. You can ask him if
10 he has an understanding, but -----

11 MR POWELL: I am asking him.

12 MR BOOTH: ----- you are very, very close to
13 legal issues here, Jed, and I'm not going to let you
14 ask him legal issues. And I'm not going to let you ask
15 him how he thinks this trumps the Service of Suit
16 clause or vice versa.

17 MR POWELL: I won't do that. I won't do that.

18 MR BOOTH: Yes. I'm not going to let you get
19 into that. So if that's where you're going....

20 BY MR POWELL:

21 Q. We are going to talk about what I think is a
22 mistake in your wording; okay?

23 A. Okay.

24 Q. That's what I'm going to talk to you about.

25 So you agree that this says "exclusive jurisdiction in

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.a-a-cr.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 22 of 28



1 English courts" meaning "the courts"; correct? It says
2 "courts"?

3 A. Yes, yes.

4 Q. And the English are very precise in their
5 language, much more so than the Americans, I must
6 confess, but you guys are precise when you write these
7 things and you intend to be; right? You do intend to
8 be; correct?

9 A. We do intend to be precise.

10 Q. It then says:

11 "The seat of arbitration shall be London."

12 Do you see that?

13 A. I do.

14 Q. Do you admit and acknowledge that that's
15 a mistake?

16 A. Yes.

17 Q. Okay.

18 A. Well, I say it is a mistake; it is not
19 normal. It is not normal and I certainly wasn't aware
20 that we were choosing -----

21 THE COURT REPORTER: Sorry. I can't -----

22 THE WITNESS: I'm sorry. I'm talking too
23 quickly.

24 THE COURT REPORTER: "...and I certainly
25 wasn't aware that we were choosing..."?

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacrl.com Document 122 Filed 04/06/2007 Page 23 of 28


ANGLO-AMERICAN
COURT REPORTERS

1 THE WITNESS: I certainly wouldn't have been
2 aware we were choosing to specifically state that we
3 were going to have an arbitration in London as another
4 way of dealing with any arguments or disagreements,
5 arbitrating this particular case.

6 BY MR POWELL:

7 Q. Would you agree with me that it is
8 inconsistent to say that the exclusive jurisdiction
9 will be in the courts and the seat of arbitration will
10 be in London?

11 MR BOOTH: Hang on, hang on. That is a legal
12 issue and -- you're asking for a legal opinion.

13 MR POWELL: Let me establish a little
14 foundation here, okay.

15 MR BOOTH: You can try, but I don't think he
16 is going to answer that question.

17 BY MR POWELL:

18 Q. How many years have you been an underwriter
19 in Lloyd's?

20 A. For 27 years.

21 Q. In your 27 years, have you ever,
22 before today, or in the context of this policy, seen a
23 "seat of arbitration shall be London" provision at the
24 back end of an "exclusive jurisdiction shall be in the
25 English courts" clause?

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.a-acr.com

E-mail: info@a-acr.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 24 of 28



1 A. I don't remember seeing one.

2 Q. Okay. Fair to say that where you have, in the
3 norm, seen "The seat of arbitration shall be in
4 London", it is preceded by an arbitration clause in
5 that agreement?

6 A. Yes, agreed.

7 Q. Okay. And there is no arbitration clause in
8 this agreement, is there?

9 A. I -----

10 MR BOOTH: Hang on, hang on. I object to that.
11 That misstates the document. I mean, it is there. You
12 may not like it, but it is there. It does say, "The
13 seat of arbitration shall be London."

14 MR POWELL: Excuse me, Forrest, that is
15 totally inappropriate. I'm asking this witness -----

16 MR BOOTH: Well, you're arguing with him.

17 MR POWELL: I'm not. I think I'm arguing with
18 you now.

19 MR BOOTH: Okay. You're arguing with me. Well,
20 you're going to have to argue with me because I'm not
21 going to allow him to give a legal interpretation of
22 that if you want -- it is already before the court
23 in Guam.

24 MR POWELL: You got -- actually, I think we
25 can clear this up very quickly.

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacrl.com Document 122 Filed 04/06/2007 Page 25 of 28



1 MR BOOTH: It is our position that that is an
2 arbitration clause.

3 MR POWELL: Now you're arguing for the record
4 and steering the witness and I object strongly to that.

5 MR BOOTH: No, I'm not. I'm just saying that
6 is my position.

7 MR POWELL: I am going to ask Steve Gargrave
8 my question.

9 BY MR POWELL:

10 Q. Specifically point to me in this contract
11 where there is an arbitration clause, as you understand
12 it in the London Market. Show me.

13 A. I don't think there will be one in here.
14 I certainly -- I certainly know there is not an
15 arbitration clause in the U.S. Vessel Pollution
16 Insurance Policy, but the Choice of Law & Jurisdiction
17 does say, "The seat of arbitration shall be London."

18 Q. You know what I mean, though, when I ask you
19 to show me an arbitration clause, don't you?

20 A. I am aware that arbitration clauses normally
21 have a heading "Arbitration Clause", yes.

22 Q. Thanks. And there is not such a thing here,
23 is there?

24 A. No, there isn't.

25 Q. Okay.

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacn.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 26 of 28



(Pause)

Q. Would you agree with me that no one can ever say that Marwan and Gargrave agreed to the terms of their insurance policy?

MR BOOTH: I have a standing objection to that and to the sense that obviously you have agents acting on your behalf who are negotiating. With that understanding, I mean we stipulate there is no direct negotiation.

THE WITNESS: Agreed. There was no direct agreement, but one has to presume, from what we have issued through the chain of the agents of both the underwriter and the assured, that something has been finally agreed.

BY MR POWELL:

Q. Fair enough and I think Forrest's point is well taken. Let me backtrack off of that question and ask this: at no point in time, when the contract of insurance was being negotiated and in fact for what we have established three or four weeks thereafter, was a wording produced where someone could say Marwan or its agents had agreed to the jurisdiction clause?

A. It would appear not, from the documents that I have seen.

Q. Okay. What time do you need to go?

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.aacourt.com Document 122 Filed 04/06/2007 Page 27 of 28


ANGLO-AMERICAN
COURT REPORTERS

C E R T I F I C A T E

I, LEAH WILLERSDORF, Accredited Verbatim Court Reporter, Associate of the British Institute of Verbatim Reporters, do hereby certify that the foregoing transcript taken of the deposition of MR STEPHEN GARGRAVE on Wednesday, March 7, 2007 is true and accurate to the best of my knowledge, skill and ability; that the testimony of said witness was taken and reduced to stenotype writing before me; that the said deposition is a true and accurate record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto; nor financially or otherwise interested in the outcome of the action.



LEAH M WILLERSDORF

Accredited Court Reporter

Associate of the British Institute
of Verbatim Reporters

ANGLO-AMERICAN COURT REPORTERS LTD
LONDON, ENGLAND

Tel: (011 44) 20 7264 2088

Fax: (011 44) 20 7265 1703

Website: www.a-acr.com

E-mail: info@a-acr.com

Case 1:06-cv-00011 Document 122 Filed 04/06/2007 Page 28 of 28

